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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FOUR

In re TYLER E., a Person Coming Under
the Juvenile Court Law.

B236113

(Los Angeles County
Super. Ct. No. CK28787)

LOS ANGELES COUNTY
DEPARTMENT OF CHILDREN AND
FAMILY SERVICES,

Plaintiff and Respondent,

v.

J.E.,

Defendant and Appellant.

APPEAL from an order of the Superior Court of Los Angeles County, Veronica
McBeth, Judge. Affirmed.

Catherine C. Czar, under appointment by the Court of Appeal, for Defendant and
Appellant.

Andrea Sheridan Ordin, County Counsel, James M. Owens, Assistant County
Counsel, and William D. Thetford, Principal Deputy County Counsel, for Plaintiff and
Respondent.

Mother J. E. appeals from denial of her petition seeking modification of juvenile dependency orders under Welfare and Institutions Code section 388.¹ She also contends the denial of her section 388 petition, coupled with the social worker's discontinuance of visitation, deprived her of the opportunity to successfully invoke the beneficial parental relationship to adoption at the section 366.26 permanency planning hearing and constituted a violation of due process. We find no abuse of discretion in denial of mother's section 388 petition and no basis for reversal of the order terminating parental rights.

FACTUAL AND PROCEDURAL SUMMARY

As a child, mother was the subject of a dependency case because of sexual abuse by her mother's boyfriend. Her three older children were the subjects of a prior dependency proceeding. She failed to reunify with those children, who are now under legal guardianships. Her son, Tyler E., born February 2009, is the subject of the present case.² In September 2009, the Department of Children and Family Services (the Department) received a referral indicating that mother had left seven-month-old Tyler in the care of his maternal grandmother, subjecting the child to risk of severe neglect. Tyler was removed from mother's custody. Mother had a criminal history and history of substance abuse. Maternal grandmother appeared to be under the influence of drugs or medication when contacted by the social worker. A petition was filed alleging that Tyler is a child coming within section 300, subdivisions (b) and (g). He was placed in foster care.

Tyler briefly was released to mother on condition mother and child live with a maternal aunt and uncle. Mother completed a month and a half of Mommy and Me classes with Tyler before her arrest on November 2, 2009. In November 2009, an

¹ Statutory references are to the Welfare and Institutions Code.

² DNA testing excluded an alleged father. A second alleged father was identified; he is not a party to this appeal.

amended petition was filed, alleging mother had been arrested on an outstanding warrant for possession of crack cocaine. She was sentenced to three years in state prison, but because of credits, expected to serve 13 months. Tyler was removed from mother's custody and all relatives and extended family members were to be assessed for placement.

The Department recommended that Mother be granted reunification services, including parenting education and individual counseling. Mother completed some sessions on dependency proceedings, domestic violence, life skills, health, and one and one-half hours of parenting and child support education prior to her arrest. But by early March 2010, mother was housed in a correctional facility where no programs or services were available. She was awaiting transfer to a facility where programs and services would be available, but this normally took 60 days.

Mother waived her right to trial and submitted on the social worker's reports. The court sustained the petition as amended, finding that mother was incarcerated and had not made an appropriate plan for the child's care and supervision. Reunification services were ordered for mother, including a parenting program, individual counseling, and completion of a GED program. In April 2010, the social worker was informed by mother's prison counselor that, due to budget cuts, the prison did not offer parenting classes. Mother's requests to receive individual counseling and classes towards a GED were under consideration by the facility. By August 31, 2010, mother's prison counselor informed the social worker that mother had been assigned to parenting classes and Narcotics Anonymous. Mother had been assigned to a therapist but had not yet attended any sessions despite the counselor's encouragement.

As of September 2010, Tyler was thriving in the home of his foster parents, who were interested in adopting him. There were no visits with mother because she was not housed locally. Maternal grandmother failed to keep a scheduled visit in April 2010. The Department recommended that mother's reunification services be terminated and a section 366.26 hearing be scheduled to terminate mother's paternal rights and free Tyler for adoption.

Mother began parenting classes in prison on October 5, 2010 and had attended four or five classes by October 25, 2010. She had not been able to enroll in classes toward her GED because there was a long waiting list where she was housed. She denied that individual counseling had been made available to her in prison. Mother expected to be released from prison on December 15, 2010. Her plan was to attend a 13-month program at Phoenix House, which offered all the services she needed and would allow Tyler to reside with her.

Mother was present at the section 366.21, subdivision (e) review hearing on November 1, 2010. Counsel for Tyler notified the court that the 18-month date deadline for provision of services was four months away and asked the court to terminate services and set a section 366.26 hearing. The juvenile court found mother was not in compliance with her case plan, terminated reunification services, and set a section 366.26 hearing for February 28, 2011.

On December 19, 2010, mother was released from prison. She visited Tyler for the first time after that on January 6, 2011. Mother was upset when she saw how attached Tyler was to his foster parents. Twelve days later, mother contacted the social worker to find out what she needed to do to reunite with Tyler. The social worker reminded mother about the reunification services she had been ordered to complete. Mother claimed to have completed a parenting class but could not provide a certificate of completion because of the cost. The worker told her that no-cost referrals had been provided.

Tyler was being transitioned to a new home with an approved home study after his foster parents decided against adoption. The Department recommended termination of parental rights. Mother failed to appear for the section 366.26 hearing. The hearing was continued because Tyler was not yet in a prospective adoptive home. In February 2011, Tyler was moved into the home of his new prospective adoptive parents. A permanent planning hearing was set for April 11, 2011.

On April 7, 2011, mother filed a petition pursuant to section 388 to modify the court's order terminating her reunification services. As changed circumstances

warranting the modification, mother asserted that she had been released from prison, had participated in parenting classes and individual counseling, and had visited Tyler every week until he was moved to the new prospective adoptive home in February 2011. At that point, mother said the social worker told her she was no longer entitled to visits. Mother asked the court to reinstate reunification services, take the section 366.26 hearing off calendar, and order visitation two to three times a week for a duration of two to three hours each visit. She claimed that the modification was in Tyler's best interest because the child recognized her as his mother and is bonded to her. Reinstatement of services would strengthen this bond and "move this family forward toward ultimate reunification." The request was denied without hearing because the court found no new evidence or change of circumstances and concluded that the proposed change of order did not serve the best interests of the child.

In a last minute information for the court, dated April 11, 2011, the Department reported that Tyler had adjusted well to the home of his prospective adoptive parents, who remained committed and excited about adopting him. The section 366.26 hearing was continued to May 23, 2011. On May 19, 2011, mother filed a new petition under section 388 based on the same grounds raised in her earlier petition. A hearing date of June 27, 2011 was set on the petition and the section 366.26 hearing was continued to the same date.

A scheduled visit for mother was canceled on June 13, 2011 due to an emergency on the social worker's caseload. Mother failed to appear for a scheduled visit on June 17, 2011 and the cell number she had provided to the social worker was no longer in service. Mother did not contact the social worker to cancel the visit. The Department recommended that mother's parental rights be terminated. After another continuance, the court held the section 366.26 and section 388 contested hearings on July 21, 2011.

Mother testified as to her section 388 petition. She claimed to have completed nearly six months of parenting classes (she actually enrolled in the program on March 2, 2011). She also started individual counseling in March 2011. She learned to walk away when she gets angry and how to avoid taking her anger out on her children. Mother also

learned to teach her children to stay in school. On visits with Tyler, he calls her “Mommy,” and says he loves her and misses her. Mother explained that when Tyler was moved to his present placement, the social worker told her she had no right to visitation. She had been trying since then to get visitation.

Counsel for mother argued the section 388 petition should be granted because mother was unable to fully participate in the reunification plan for all of 2010 due to her incarceration and the unavailability of programs where she was housed because she was incarcerated for a short term. He argued that mother had participated in services since her release and had not been in any new trouble. He argued that the social worker wrongfully prevented mother from having visits with Tyler between February and June 2011. Counsel for Tyler asked the court to deny the section 388 petition for additional reunification services in light of mother’s lengthy history with the Department in cases involving her three older children and this case involving Tyler. Tyler’s counsel argued that denial was in the best interests of the child in light of his right to permanency and mother’s history of failing to follow through with services. The Department also argued the section 388 petition should be denied because no changed circumstances were demonstrated and granting the request would not be in Tyler’s best interests.

The court denied the section 388 petition because mother had not demonstrated significant changes of circumstances or that the petition was in the child’s best interests. Mother’s testimony that Tyler cried for prolonged periods during visits when the foster parent left led the court to conclude that there was a significant lack of bonding between mother and the child. The court acknowledged mother’s efforts “to get herself together” and the fact that she too had been a victim.

The section 366.26 hearing was then held. Mother testified that her older children shared visits with Tyler and the children enjoyed playing together. The older children know Tyler is a sibling. She said Tyler’s grandmother and sister had tried to have him placed with them. In argument, counsel for mother invoked that the beneficial parent-child relationship exception to termination of parental rights under section 366.26, subdivision (c)(1)(A). He contended that mother had made sincere efforts to reunify with

Tyler once she was released from prison. He cited the social worker's wrongful termination of mother's right to visit in 2011. Counsel for mother also argued that the sibling relationship exception to termination of parental rights under section 366.26, subdivision (c)(1)(B)(v) applied. In addition, mother's counsel argued the Department had not satisfied the preference for placement with a relative in light of family members who came forward seeking placement of Tyler with them. During the course of this case, various maternal relatives expressed interest in having custody of Tyler. They either failed to follow through with the Department, or were found ineligible because of their criminal histories.

Counsel for the children argued that Tyler is adoptable and is in a loving home where he already was bonded to the foster father. She asked the court to find no exceptions apply to termination of parental rights because mother's actions did not outweigh Tyler's best interests in adoption by the current caregivers. Counsel also noted that the maternal aunt previously had been excluded from placement because of her criminal history. Counsel for the Department asked the court to terminate mother's parental rights and find Tyler adoptable. He cited mother's failure to remain in communication with the social worker as a factor contributing to the problems with visitation. Counsel for the Department also argued there was no bond between mother and Tyler sufficient to warrant application of the exception to termination of parental rights.

The juvenile court concluded that there should not have been a gap in visitation. But it found no exceptions applicable. Tyler was found adoptable with adoption as the permanent plan for him. Mother's parental rights were terminated. This timely appeal followed.

DISCUSSION

I

Mother argues the juvenile court erred in denying her petition under section 388.

“Section 388 allows a parent or other person with an interest in a dependent child to petition the juvenile court to change, modify, or set aside any previous order. (§ 388, subd. (a).) ‘Section 388 provides the “escape mechanism” that . . . must be built into the process to allow the court to consider new information.’ [Citations.] The petitioner has the burden of showing by a preponderance of the evidence (1) that there is new evidence or a change of circumstances and (2) that the proposed modification would be in the best interests of the child. [Citations.] That is, ‘[i]t is not enough for [the petitioner] to show just a genuine change of circumstances under the statute. The [petitioner] must show that the undoing of the prior order would be in the best interests of the child. [Citation.]’ (*In re Kimberly F.* (1997) 56 Cal.App.4th 519, 529.) Furthermore, the petitioner must show changed, not changing, circumstances. [Citation.] The change of circumstances or new evidence ‘must be of such significant nature that it requires a setting aside or modification of the challenged prior order.’ [Citation.]” (*In re Mickel O.* (2011) 197 Cal.App.4th 586, 615, italics omitted.)

“In evaluating whether the petitioner has met his or her burden to show changed circumstances, the trial court should consider (1) the seriousness of the problem which led to the dependency, and the reason for any continuation of that problem; (2) the strength of relative bonds between the dependent children to both parent and caretakers; and (3) the degree to which the problem may be easily removed or ameliorated, and the degree to which it actually has been. (*Kimberly F., supra*, 56 Cal.App.4th at p. 532.) The petition is addressed to the sound discretion of the juvenile court, and its decision will not be overturned on appeal in the absence of a clear abuse of discretion. [Citations.]” (*In re A.A.* (2012) 203 Cal.App.4th 597, 612.)

We agree with the juvenile court that mother failed to demonstrate either sufficiently changed circumstances or that her requests were in Tyler’s best interests. As the court noted, mother should have been offered continuous visitation once she was

released from prison, and the social worker appears to have been partially responsible for the interruption in visitation. But mother also failed to provide good telephone numbers and addresses to the social worker to facilitate communications with the Department. She did not enroll in services until March 2011, although she was released from prison in December 2010. Mother's partial compliance with services and troubled visits with Tyler do not establish that the juvenile court abused its discretion in denying the section 388 petition. Tyler was thriving in his prospective adoptive home and was bonded with his caregivers. We find no basis to reverse in the denial of the section 388 petition.

II

Mother also argues that the denial of her section 388 petition, coupled with the interruption in visitation by the social worker, deprived her of an opportunity to establish a pattern of visitation necessary to successfully raise the beneficial parental relationship exception to adoption.

“Section 366.26 provides an exception to the general legislative preference for adoption when ‘[t]he court finds a compelling reason for determining that termination would be detrimental to the child’ (§ 366.26, subd. (c)(1)(B)) because ‘[t]he parents have maintained regular visitation and contact with the child and the child would benefit from continuing the relationship.’ (§ 366.26, subd. (c)(1)(B)(i).) The ‘benefit’ prong of the exception requires the parent to prove his or her relationship with the child ‘promotes the well-being of the child to such a degree as to outweigh the well-being the child would gain in a permanent home with new, adoptive parents.’ [Citations.] No matter how loving and frequent the contact, and notwithstanding the existence of an ‘emotional bond’ with the child, ‘the parents must show that they occupy “a parental role” in the child’s life.’ [Citations.] The relationship that gives rise to this exception to the statutory preference for adoption ‘characteristically aris[es] from day-to-day interaction, companionship and shared experiences. Day-to-day contact is not necessarily required, although it is typical in a parent-child relationship.’ [Citation.] Moreover, ‘[b]ecause a section 366.26 hearing occurs only after the court has repeatedly found the parent unable

to meet the child's needs, it is only in an extraordinary case that preservation of the parent's rights will prevail over the Legislature's preference for adoptive placement.' [Citation.]" (*In re K.P.* (2012) 203 Cal.App.4th 614, 621.)

As we have discussed, the juvenile court did not abuse its discretion by denying the section 388 petition. Mother's inability to satisfy the test for the beneficial parent child relationship exception was due in large part to her incarceration for 13 months, starting when Tyler was only seven months old. Even after her release, she was unable to establish a parental relationship with Tyler, as evidenced by the fact that he cried for long periods during her visits when separated from his foster parents. We conclude that the denial of the section 388 petition is not the reason mother was unable to establish this exception to termination of parental rights.

In a related argument, mother contends that the interruption in her visitation violated her due process rights. (See *In re Valerie A.* (2007) 152 Cal.App.4th 987, 1007.) Mother testified inconsistently regarding the number of visits she missed during the period when the social worker told her she had no right to visit Tyler after he was moved to a new foster home in February 2011. Mother testified that her visits ended when Tyler was moved at the end of February 2011. She did not contact the social worker about the visitation problem until April. Visits resumed twice a week in June 2011. No visits occurred between March and mid-June 2011. Mother's visits with Tyler should not have been interrupted by the social worker. But mother has failed to demonstrate that if visits had continued, she would be able to demonstrate a relationship with Tyler that would outweigh his interest in a permanent, stable, home. Tyler was only seven months old when mother was incarcerated. During her 13-month absence he thrived in foster care and established stable, loving relationships. After her release, mother failed to establish a stable living situation, secure employment, or address the issues which led to this proceeding. She testified that the only issue she had to discuss with her individual counselor concerned her own molestation as a child. She denied that her drug use was the reason her three older children were made dependents of the court.

On this record, we find no due process violation warranting reversal of the order terminating parental rights.

DISPOSITION

The orders denying mother's section 388 petition and terminating parental rights are affirmed.

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EPSTEIN, P. J.

We concur:

WILLHITE, J.

MANELLA, J.